2003

State of Utah, Plaintiff,Appellee, v. Thomas Kevin Rothlisberger, Defendant, Appellant : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	**Case No. 20030494-CA**
THOMAS KEVIN ROTHLISBERGER,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JUDGMENT AND SENTENCE
ENTERED IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH,
THE HONORABLE LYLE R. ANDERSON, JUDGE, PRESIDING.

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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BRIEF OF APPELLANT

JURISDICTION

UTAH CODE ANN. §78-2a-3(2)(e) provides this Court's jurisdiction over this appeal from the *Judgment and Order of Probation* entered May 21, 2003, in this case involving a second degree felony conviction from a court of record.

CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW

ISSUE I: *Did the trial court violate UTAH RULES OF CRIMINAL PROCEDURE 16 in overruling the objection by defense counsel to Chief Adair's expert testimony?*

STANDARD OF REVIEW: This Court reviews the trial court's admission or exclusion of expert testimony for an abuse of discretion. Alder v. Bayer Corp., AGFA Div., 2002 UT 115, ¶20, 61 P.3d 1068. Whether the trial court failed to order a requested remedy

or whether the remedy ordered was insufficient to obviate the harm resulting from a violation under Rule 16, UTAH RULES OF CRIMINAL PROCEDURE, is reviewed under an abuse-of-discretion standard. State v. Menzies, 889 P.2d 393, 401 (Utah 1994) *citing* State v. Knight, 734 P.2d 913, 918-919 (Utah 1987).

ISSUE II: *Did the trial court violate UTAH CODE ANN. §77-17-13 in overruling the objection by defense counsel to Chief Adair's expert testimony?*

STANDARD OF REVIEW: This Court reviews the trial court's admission or exclusion of expert testimony for an abuse of discretion. Alder v. Bayer Corp., AGFA Div., 2002 UT 115, ¶20, 61 P.3d 1068. When reviewing trial court's denial of requested continuance in violation of UTAH CODE ANN. §77-17-13 for failure to adequately disclose expert witnesses before trial, this Court considers: (1) extent of appellant's diligence in his or her efforts to ready his or her defense prior to the date set for trial, (2) likelihood that need for continuance could have been met if continuance had been granted, (3) extent to which granting continuance would have inconvenienced court and opposing party, and (4) extent to which appellant might have suffered harm as result of court's denial. State v. Tolano, 2001 UT App. 37, ¶9, 19 P.3d 400.

ISSUE III: *Was Appellant's trial counsel ineffective in failing to request the mandatory continuance under UTAH CODE ANN. §77-17-13?*

STANDARD OF REVIEW: This Court reviews ineffective assistance of counsel claims raised for the first time on appeal as a matter of law. State v. Maestas, 1999 UT 32,

¶20, 984 P.2d 376. To establish ineffective assistance of counsel, a defendant must show that trial counsel " 'rendered deficient performance [that] fell below an objective standard of reasonable professional judgment' and that 'counsel's performance prejudiced' " the defendant. *Id.*; *see also* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

ISSUE IV: *Was the evidence sufficient to support the jury's verdict that Appellant was guilty of Possession of a Controlled Substance With Intent to Distribute, a second degree felony?*

STANDARD OF REVIEW: This court's power to review a jury verdict challenged on grounds of insufficient evidence is limited. State v. Silva, 2000 UT App 292,¶ 13, 13 P.3d 604 (quotations and citations omitted). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, this Court's inquiry stops. State v. Mead, 2001 UT 58,¶ 67, 27 P.3d 1115 (quotations and citation omitted). This Court will reverse a jury verdict only when it finds that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. State v. Hardy, 2002 UT App 244,¶ 7, 54 P.3d 645 (*quoting* State v. Silva, 2000 UT App 292, ¶ 13, 13 P.3d 604) (additional quotations and citations omitted).

ISSUE V: *Did the trial court err in denying Appellant's motion for a directed verdict?*

STANDARD OF REVIEW: In reviewing a trial court's rulings pertaining to a motion for a directed verdict, this court reviews the evidence in the light most favorable to the non-moving party and to afford him the benefit of all inferences which the evidence fairly supports. If reasonable persons could reach differing conclusions on the issue in controversy, a jury question exists and the motion should be denied. Depew v. Sullivan, 2003 UT App 152, ¶41 at fn. 18, *citing* McCloud v. Baum, 569 P.2d 1125, 1126-1127 (Utah 1977).

Issue VI: *Did the trial court err in overruling defense counsel's objection to the prosecutor's misstatement of law in his closing?*

Standard of Review: In determining whether a given statement constitutes prosecutorial misconduct, this Court must view the statement in light of the totality of the evidence presented at trial; further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings will not be overturned absent an abuse of discretion. State v. Longshaw, 961 P.2d 925 (Utah App. 1998).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, Amend. VI and XIV

UTAH CONSTITUTION, Art. 1 § 7

UTAH CODE ANN. §77-17-13

UTAH RULES OF CRIMINAL PROCEDURE 16

UTAH RULES OF EVIDENCE and FEDERAL RULES OF EVIDENCE 702

STATEMENT OF THE CASE

On September 24, 2002, Appellant herein, Thomas Kevin Rothlisberger (herinafter "**Rothlisberger**"), was traveling as a passenger in a car driven by Tanya Althoff (hereinafter "**Althoff**") returning to Moab, Utah, from a road trip they had been on to Arizona (Tr. at p. 50). Officer Eberling effectuated a traffic stop of the vehicle for improper lane travel, then released Althoff. *Id.* at p. 72. Upon returning to his vehicle, Officer Eberling was informed by dispatch that the plates on Althoff's vehicle were expired. *Id.* at p. 51. Officer Eberling effectuated a second stop approximately 1 ½ blocks from the first. *Id.* at pp. 52, 72.

After requesting Althoff's license and registration, Officer Eberling was informed that her driver's license was suspended (Tr. at pp. 52-53, 72, 139). He placed Althoff under arrest and conducted a search of the vehicle incident to the arrest. *Id.* Eberling located a small baggy of a white substance on the console between the two front seats. *Id.* at pp. 53, 64, 73, 98. Chief Adair (hereinafter "**Adair**") arrived to assist and Eberling placed Rothlisberger under arrest for possession of methamphetamine. *Id.* at p. 54-55, 80, 83.

The vehicle was moved to an abandoned service station, where the two policemen continued searching the vehicle (Tr. at pp. 55, 74, 76-77, 80, 83-84). Adair located a large bag of methamphetamine in a toilet paper roll in the passenger door and a snort bottle, containing only residue of methamphetamine, in a pair of men's pants that was located in the passenger door panel. *Id.* at pp. 56-58, 60, 64, 74, 84-86, 93, 97-99, 100-101; Exhibits 1, 5, 6 and 9. Rothlisberger claimed the pants and the snort bottle as his. *Id.* at p. 87. Althoff

claimed the methamphetamine as hers and stated that Rothlisberger knew nothing about it. *Id.* at pp. 61, 69, 71, 95. Eberling found a gym bag in the back seat, which Althoff claimed as hers and which contained a wooden box. *Id.* at pp. 59, 62-63, 69, 71. The wooden box contained scales, which had white residue on them, and several baggies. *Id.* at 59; Exhibits 7 and 8.

On September 26, 2002, Rothlisberger was charged by Information with Possession of a Controlled Substance With Intent to Distribute, a second degree felony; and Possession of Drug Paraphernalia, a Class B Misdemeanor (R0001-R0002). On February 11, 2003, Rothlisberger was found guilty of both the felony and the misdemeanor (Tr. at p. 173).

On May 5, 2003, Rothlisberger appeared for sentencing before this Court and was sentenced to a term of one (1) to fifteen (15) years on the felony, and six (6) months on the misdemeanor (R0115-R0117; Addendum "A"). The prison sentence was stayed and Rothlisberger was placed on thirty-six (36) months' probation, to include service of twelve (12) months in the San Juan County Jail, with credit for time served. *Id.* On May 21, 2003, this Court entered its *Judgment and Order of Probation* (hereinafter the "**Judgment**") in this matter. *Id.* On June 6, 2003, Rothlisberger filed his *Notice of Appeal* from the Judgment entered with respect to this matter (R0118-R0119).

On June 16, 2003, Rothlisberger filed his *Motion for Certificate of Probable Cause and Memorandum in Support* (the "**First Motion**") in the Seventh Judicial District Court. On July 3, 2003, Honorable Lyle R. Anderson denied the First Motion. On July 14, 2003,

Rothlisberger filed his *Motion to Set Aside Order, Renew Motion for Certificate of Probable Cause, and Strike Hearing* (the "**Second Motion**"). On July 29, 2003, Honorable Lyle R. Anderson entered the court's *Ruling on Renewed Motion for Certificate of Probable Cause*, denying the Second Motion. On August 8, 2003, Rothlisberger filed his *Motion for Certificate of Probable Cause and Memorandum in Support*, together with the *Affidavit of Barton J. Warren in Support of Motion for Certificate of Probable Cause* (the "**Third Motion**") with this Court.

STATEMENT OF FACTS

On September 24, 2002, Rothlisberger was traveling as a passenger in a car driven by Althoff returning to Moab, Utah, from a road trip they had been on to Arizona (Tr. at p. 50). Early in the afternoon that day, Althoff was driving through Monticello, Utah, when Officer Jim Eberling (hereinafter "**Eberling**") effectuated a traffic stop on the vehicle for improper lane travel. *Id.* at pp. 50, 71-72, 139. After speaking briefly with Althoff, Eberling released her. *Id.* at p. 51, 72, 139.

Upon returning to his car, Eberling was informed by dispatch that the license plates on the vehicle Althoff was driving had expired (Tr. at p. 51). Based upon this information, Eberling effectuated a second stop of the vehicle approximately 1 ½ blocks from the initial stop. *Id.* at p. 52, 72. Subsequent to the second stop, Eberling ran a check on Althoff's driver's license and, upon receiving information that it was suspended, placed Althoff under

arrest. *Id.* at pp. 52-53, 72, 139. Eberling handcuffed Althoff and placed her in his car. *Id.* at pp. 53, 67, 80, 139.

Rothlisberger exited the car and informed Eberling that he needed to use the bathroom (Tr. at pp. 137-138, 140-141). Eberling accompanied Rothlisberger to the bathroom. *Id.* Upon returning from the bathroom, Eberling executed a search of the vehicle, subsequent to Althoff's arrest, and located a small baggy of a white substance on the console between the two front seats. *Id.* at pp. 53, 64, 73, 98.

At that time, police chief Kent Adair (hereinafter "**Adair**") arrived to assist Eberling (Tr. at p. 55, 83). Upon locating the small baggy found in the console, Eberling handcuffed Rothlisberger and placed him under arrest for possession of methamphetamine. *Id.* at pp. 54, 80. Adair had Rothlisberger move the vehicle across the street to a gravel parking lot by an old abandoned Exxon service station. *Id.* at pp. 55, 74, 76-77, 80, 83-84. Adair continued searching the vehicle and located a large bag of methamphetamine in a toilet paper roll in the passenger door and a snort bottle, containing only residue of methamphetamine, in a pair of men's pants that was located in the passenger door panel. *Id.* at pp. 56-58, 60, 64, 74, 84-86, 93, 97-99, 100-101; Exhibits 1, 5, 6 and 9. Adair approached Rothlisberger, mirandized him and asked him several questions. *Id.* at pp. 87-88. Rothlisberger admitted to Eberling and Adair that the pants and the snort bottle were his. *Id.* at p. 87.

Eberling then read Althoff her Miranda rights in the back of his patrol car (Tr. at p. 61). She then informed Eberling that the crystal methamphetamine was hers and that

Rothlisberger did not know it was there. *Id.* at pp. 61, 69, 71. Adair overheard Althoff yell from the patrol car that Rothlisberger did not know anything about the methamphetamine. *Id.* at p. 95. Althoff told Eberling that she obtained the methamphetamine from a friend in Bluff. *Id.* at p. 69. In further search of the vehicle, Eberling found a gym bag in the back seat, which Althoff claimed as hers and which contained a wooden box. *Id.* at pp. 59, 62-63, 69, 71. The wooden box contained scales, which had white residue on them, and several baggies. *Id.* at 59; Exhibits 7 and 8.

Eberling then uncuffed Althoff, had her exit the vehicle and perform field sobriety tests (Tr. at pp. 70, 78-80, 131-133). She later consented to a urinalysis test. *Id.* at pp. 61, 70; Exhibit 2. Rothlisberger admitted to having used methamphetamine that morning before they left Arizona. *Id.* at p. 88. Neither Eberling nor Adair either requested or obtained a urinalysis test of Rothlisberger. *Id.* at pp. 70-71.

On September 26, 2002, Rothlisberger was charged by Information with Possession of a Controlled Substance With Intent to Distribute, a second degree felony; and Possession of Drug Paraphernalia, a Class B Misdemeanor (R0001-R0002). On February 11, 2003, the matter came for trial before a jury in the above entitled Court, at which time Rothlisberger was found guilty of Possession of a Controlled Substance With Intent to Distribute, a second degree felony; and Possession of Drug Paraphernalia, a Class B Misdemeanor (Tr. at p. 173).

On May 5, 2003, Rothlisberger appeared for sentencing before this Court and was sentenced to a term of one (1) to fifteen (15) years on the felony, and six (6) months on the

misdemeanor (R0115-R0117; Addendum "A"). The prison sentence was stayed and Rothlisberger was placed on thirty-six (36) months' probation, to include service of twelve (12) months in the San Juan County Jail, with credit for time served. *Id.* On May 21, 2003, this Court entered its *Judgment and Order of Probation* (hereinafter the "**Judgment**") in this matter. *Id.* On June 6, 2003, Rothlisberger filed his *Notice of Appeal* from the Judgment entered with respect to this matter (R0118-R0119).

SUMMARY OF ARGUMENT

The United States 10th Circuit Court of Appeals has determined that evidence on the significance of the amount of drug possessed is specialized and not within the purview of a typical juror's knowledge, thereby requiring an "expert" to testify to provide the jurors with the knowledge necessary to the understanding. U.S. v. Muldrow, 19 F.3d 1332, 1338 (C.A.10 (Kan.),1994) *citing* United States v. McDonald, 933 F.2d 1519 (10th Cir.), *cert. denied*, 502 U.S. 897, 112 S.Ct. 270, 116 L.Ed.2d 222 (1991)("[a] person possessing no knowledge of the drug world would find the importance of [the amount possessed] impossible to understand...[t]he average juror would not know whether this quantity is a mere trace, or sufficient to pollute 1,000 people.").

UTAH RULES OF CRIMINAL PROCEDURE 16(a)(5) states that "...the prosecutor shall disclose to the defense upon request. . .any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant

to adequately prepare his defense." UTAH RULES OF CRIMINAL PROCEDURE 16(g) establishes the following:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Utah courts have held that, under UTAH RULES OF CRIMINAL PROCEDURE 16, undisclosed expert testimony is properly excluded where expert witnesses or their testimonies are not disclosed by a certain date before trial to allow opposing parties to prepare for trial by deposing witnesses, planning for effective cross-examination, and obtaining rebuttal testimony. *See*, Turner v. Nelson, 872 P.2d 1021, 1023-1024 (Utah 1994)(upholding exclusion of undisclosed rebuttal witness called to testify to reasonably anticipated defense); Hardy v. Hardy, 776 P.2d 917, 925 (Utah App. 1989) (excluding expert's evidence because not timely provided to opposing party).

UTAH CODE ANN. §77-17-13, in relevant part, states as follows:

> (1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or ten days before the hearing.
> (b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:
> (i) a copy of the expert's report, if one exists; or
> (ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and
> (iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.

> . . .
> (4) (a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.

Upon a finding that a party failed to comply with the thirty day notice requirement of UTAH CODE ANN. §77-17-13(1)(a), subsection 4(a) *requires* the trial court to grant a continuance sufficient to prepare the meet the testimony. State v. Arellano, 964 P.2d 1167, 1170 (Utah App. 1998).

The trial court erred by first not recognizing Adair as an expert, then by allowing Adair to testify as to the significance of the amount of drugs possessed and the uses of the drug paraphernalia found in the vehicle. This was in violation of both UTAH RULES OF CRIMINAL PROCEDURE 16 and UTAH CODE ANN. §77-17-13 since Adair's testimony regarding these matters was never disclosed by the State and Adair was never designated as an expert witness.

This Court will reverse a jury verdict only when it finds that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. State v. Hardy, 2002 UT App 244,¶ 7, 54 P.3d 645 (quoting Silva, 2000 UT App 292 at ¶ 13) (additional quotations and citations omitted). In challenging a denial of a motion for a directed verdict, parties are required to marshal all of the evidence in favor of the verdict and then demonstrate that the evidence is insufficient

when viewed in the light most favorable to the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991).

Rothlisberger was present in the vehicle where the drugs were found; however, a defendant's "mere occupancy of a portion of the premises where the drug[s were] found cannot, without more, support a finding" that defendant knowingly and intentionally possessed a controlled substance. State v. Hansen, 732 P.2d 127, 132 (Utah 1987). However, constructive possession may be established through circumstantial evidence. *See,* State v. Carlson, 635 P.2d 72, 74 (Utah 1981). A finding of constructive possession of controlled substances in nonexclusive occupancy settings generally is based on extensive and detailed factual evidence. *See,* State v. Anderton, 668 P.2d 1258, 1264 (Utah 1983). Circumstantial evidence presented must sufficiently exclude reasonable alternative hypotheses of innocence. State v. Layman, 953 P.2d 782, 790 (Utah App. 1998); *Cf.* State v. Shipp, 216 N.J.Super. 662, 524 A.2d 864, 866 (App.Div.1987)

Rothlisberger admitted to having used drugs earlier that day; however, this Court has previously determined that drug use does not, in and of itself, conclude that a defendant had access to and control over the drugs, even when the defendant is under the influence when investigated by police officer. State v. Layman, 953 P.2d 782, 791 (Utah App. 1998). Where consumption of a drug occurred at some prior point in the day, that evidence in and of itself does not sufficiently show that the person had "access to or control over" the drugs found by

police. *Id.* The State must have proven "mutual use and enjoyment" to support a "an inference of joint participation in a criminal enterprise." *Id.*

No evidence was presented that Rothlisberger had actual knowledge of the location of any drugs in the vehicle, but he was convicted of both possession and possession with intent to distribute. Actual knowledge of the location of drugs in the vehicle a person is traveling in, with no intent to use the drugs, cannot stand to convict a person for possession. *See* State v. Fox, 709 P.2d 316, 319 (Utah 1985) ("[P]ersons who might know of the whereabouts of illicit drugs and who might even have access to them, but who have no intent to obtain and use the drugs cannot be convicted of possession."); Shipp, 524 A.2d at 866 ("[M]ere knowledge, without more, on the part of one automobile passenger that a co-passenger is carrying illicit drugs does not constitute the former a co-possessor.").

The jury had to indulge in inference upon inference, or inference upon assumption to convict Rothlisberger of possession or possession with intent to distribute. This Court has cautioned courts to take special care to ensure that their review of the evidence does not encourage the indulging of "inference upon inference," or, worse, the indulging of inference upon assumption. State v. Layman, 953 P.2d 782, 791 (Utah App.,1998) *citing* State v. George, 481 P.2d 667 (Utah 1971) (finding "no evidence as to whether the defendants ... took the truck and camper, save by way of inference ... and we believe that under the facts of this particular case, the jury had to indulge an inference upon an inference that could lead but to conjecture").

The State carries the burden in criminal cases of proving each element of the charged crime beyond a reasonable doubt. In cases relying on constructive possession, that burden entails a presentation of extensive and detailed facts. Layman *citing* Anderton, 668 P.2d at 1263. As argued below, the facts in this case were lacking. Although the jury may reject Althoff's testimony as not credible, this Court has stated that it cannot substitute its belief as to the truth of evidence not in the record. State v. Layman, 953 P.2d 782, 790 (Utah App.,1998).

The prosecutor misstated the law in his closing arguments. In determining whether a given statement constitutes prosecutorial misconduct, this Court must view the statement in light of the totality of the evidence presented at trial; further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings will not be overturned absent an abuse of discretion. State v. Longshaw, 961 P.2d 925 (Utah App. 1998). This Court has enunciated a two-part test whereby it will reverse on the basis of prosecutorial misconduct only if defendant shows that [1] "the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, [2] under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result...." *Id.* at 928, *citing* State v. Cummins, 839 P.2d 848, 852 (Utah App.1992) (*quoting* State v. Peters, 796 P.2d 708, 712 (Utah App.1990)), *cert. denied*, 853 P.2d 897 (Utah 1993).

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTION BY DEFENSE COUNSEL TO CHIEF ADAIR'S EXPERT TESTIMONY

A. The Testimony Given by Chief Adair Was Expert Testimony under UTAH RULES OF EVIDENCE 702.

UTAH RULES OF EVIDENCE 701 states as follows:

> **If the witness is not testifying as an expert**, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

(emphasis added). UTAH RULES OF EVIDENCE 702, however, sets forth that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by **knowledge, skill, experience, training, or education,** may testify thereto in the form of an opinion or otherwise"(emphasis added). The United States 10th Circuit Court of Appeals has determined that evidence on the significance of the amount of drug possessed is specialized and not within the purview of a typical juror's knowledge, thereby requiring an "expert" to testify to provide the jurors with the knowledge necessary to the understanding. U.S. v. Muldrow, 19 F.3d 1332, 1338 (C.A.10 (Kan.),1994) *citing* United States v. McDonald, 933 F.2d 1519 (10th Cir.), *cert. denied*, 502 U.S. 897, 112 S.Ct. 270, 116 L.Ed.2d 222 (1991)("[a] person possessing no knowledge of the drug world would find the importance of [the amount

possessed] impossible to understand...[t]he average juror would not know whether this quantity is a mere trace, or sufficient to pollute 1,000 people.").

In United States v. McDonald, the trial court never formally accepted the police officer as an expert witness, but the 10th Circuit Court of Appeals assumed the witness *was* accepted as an expert witness by the trial court since the trial court heard the witness describe his qualifications, including his specialized knowledge, education, skills and experience, and then allowed the witness to give opinion testimony. McDonald at 1522, fn. 2; *see also* UTAH RULES OF EVIDENCE 702. At trial, the trial court in the instant matter never formally accepted Adair as an expert witness with respect to methamphetamine distribution and paraphernalia, stating only that he was testifying as a lay witness pursuant to Rule 701 of the UTAH RULES OF EVIDENCE (Tr. at p. 105). In the trial court's ruling on the Second Motion, however, the trial court acknowledged that it had accepted Adair as a lay witness at the trial but that, upon review for the Second Motion, determined that the testimony was "...neither expert testimony or [sic] lay opinion testimony, but merely testimony about Adair's actual **experience**" (R0211-R0213; emphasis added).

Adair's testimony was not the type of attestation a lay person could render. *See*, McDonald. The prosecutor even premised some of his questions by asking Adair to render an opinion "...through [his] **training and experience**..." as to what the typical distributional amount of methamphetamine was on the street and the uses of certain drug paraphernalia (Tr. at pp. 91-92; emphasis added). Additionally, the trial court had heard Adair describe his

qualifications, including his specialized knowledge, education, skill and experience with respect to drug distribution and paraphernalia (Tr. at pp. 81-83). Specifically, Adair testified as follows:

BY MR. HALLS:
Q. State your name and occupation.
A. My name is Kent Adair, and I'm a police officer for Monticello City.
Q. How long have you been a police officer?
A. Twenty years.
Q. What kind of training did you have before you became a police officer?
A. I went to the police academy.
Q. Have you taken or had some training in drug intervention, (inaudible) drugs, that kind of thing?
A. Yes.
Q. Has it required that you keep up some kind of a certification by taking seminars on a yearly basis?
A. We have to have 40 hours annual training.
Q. Have you done that?
A. Yes.
Q. Is that for the last 20 years?
A. Yes.
Q. How many drug cases do you think you have worked in that 20 years?
A. I don't know.
Q. So--
A. Myself or been involved in?
Q. Okay, let's go with been involved in. Give me [sic] estimate, if you can.
A. I don't know, I'd say a hundred, probably.
Q. Do you supervise anyone in your department that works with the Grand San Juan County Drug Task Force?
A. Yes.
Q. Have you been involved in cases that involve methamphetamine?
A. Yes.
Q. Are you familiar or do you know from your training and experience — well, I'm going to wait a few minutes to ask you that...

Id. Based on this information concerning Adair's specialized knowledge, education, skills and experience, the trial court allowed Adair to testify as to the significance of the amount

possessed, hence it is assumed Adair *was* accepted as an expert witness by the trial court. McDonald at 1522, fn. 2.

As discussed further below, under objection from the defense and in violation of UTAH RULES OF CRIMINAL PROCEDURE 16 and UTAH CODE ANN. §77-17-13, Adair testified as an undisclosed expert to the amount of methamphetamine considered to be a single dose and the uses of the drug paraphernalia found in the vehicle (Tr. at pp. 86-87, 90-92).

B. The State Violated UTAH RULES OF CRIMINAL PROCEDURE 16 and UTAH CODE ANN. §77-17-13, by Failing to Disclose Chief Adair's Testimony to the Defense.

(1) Adair's expert testimony should have been excluded pursuant to UTAH RULES OF CRIMINAL PROCEDURE 16.

UTAH RULES OF CRIMINAL PROCEDURE 16(a)(5) states that "...the prosecutor shall disclose to the defense upon request. . .any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense." UTAH RULES OF CRIMINAL PROCEDURE 16(g) establishes the following:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Utah courts have held that, under UTAH RULES OF CRIMINAL PROCEDURE 16, undisclosed expert testimony is properly excluded where expert witnesses or their testimonies are not disclosed by a certain date before trial to allow opposing parties to prepare for trial by

deposing witnesses, planning for effective cross-examination, and obtaining rebuttal testimony. *See*, Turner v. Nelson, 872 P.2d 1021, 1023-1024 (Utah 1994)(upholding exclusion of undisclosed rebuttal witness called to testify to reasonably anticipated defense); Hardy v. Hardy, 776 P.2d 917, 925 (Utah App. 1989) (excluding expert's evidence because not timely provided to opposing party).

Where evidence is inculpatory, the prosecutor's discovery duty is limited to disclosures under Rule 16 of the UTAH RULES OF CRIMINAL PROCEDURE. State v. Rugebregt, 965 P.2d 518, 522 (Utah App. 1998). Whether prosecutors produce inculpatory evidence under court order or upon request, they have a duty to comply fully and forthrightly. *Id.* The Utah Supreme Court has held that, when the prosecution makes a voluntary disclosure of inculpatory evidence to a defendant, the prosecution must produce all the requested material or identify those portions not disclosed. State v. Knight, 734 P.2d 913, 916-17 (Utah 1987). In cases involving wrongful failure to disclose inculpatory evidence, the State has the burden of persuading the court that the error did not unfairly prejudice Appellant and there was no reasonable likelihood that, absent the error, the outcome of the trial would have been more favorable for Appellant. *Id.* at 921.

At the trial in this matter, Appellant's trial counsel objected to Adair's testimony with respect to drug distribution amounts and paraphernalia (R0104-R0108). As established *supra*, Adair testified as an expert with respect to drug distribution amounts and paraphernalia; however, his expert testimony was not disclosed by the prosecution prior to the trial in this

matter. Adair's testimony was inculpatory and, therefore, the prosecutor had a duty to disclose it fully and forthrightly to the defense under Rule 16. State v. Rugebregt, 965 P.2d 518, 522 (Utah App.1998).

The State voluntarily disclosed to the defense that Adair would be called as a witness, designating him only as "Law Enforcement, assisting officer" on the witness list (R0028); however, the State failed to produce all of the evidence when it failed to disclose that Adair would be testifying as an expert in drug distribution and paraphernalia. *See*, Knight at 916-17.

The State's failure to disclose Adair's *expert* testimony to the defense prior to the trial in this matter denied Appellant the ability to plan for an effective cross-examination and obtain rebuttal testimony with respect to Adair. The failure to disclose Adair's testimony as to the amount of methamphetamine per dose and the uses of the drug paraphernalia found in the vehicle was clearly a violation of Rule 16 of the UTAH RULES OF CRIMINAL PROCEDURE. Given the fact that the State was charging Appellant with intent to distribute and Adair's expert testimony went directly towards that end, the State's violation of Rule 16 was prejudicial to Appellant.

(2) UTAH CODE ANN. §77-17-13 mandates that Appellant, at a minimum, was entitled to a continuance to prepare for the undisclosed expert testimony.

(a) ROTHLISBERGER'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PRESERVE THE ISSUE.

The Utah Supreme Court has stated that "ineffective assistance of trial counsel [claims] *should* be raised on appeal if the trial record is adequate to permit decision of the issue and defendant is represented by counsel other than trial counsel." State v. Strain, 885 P.2d 810, 814 (Utah App. 1994) *citing* State v. Humphries, 818 P.2d 1027, 1029 (Utah 1991)(emphasis added). As is shown below, the trial record is adequate as to the issues Appellant raises respecting ineffective assistance, and counsel herein was not Appellant's trial counsel for this matter.

To show ineffective assistance of counsel, a defendant "must establish both prongs of the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984):(1) that his counsel's performance 'fell below an objective standard of reasonableness,' *id.* at 688, 104 S.Ct. at 2064; and (2) that counsel's performance prejudiced the defendant. *Id.* at 687, 104 S.Ct. at 2064." State v. Strain, 885 P.2d 810, 814 (Utah App.1994). An ineffective assistance claim can "succeed[ ] only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." State v. Perry, 899 P.2d 1232, 1241 (Utah App.1995) (citation and quotations omitted).

The remedy for failure to provide notice of expert testimony under UTAH CODE ANN. §77-17-13 is a continuance. State v. Arellano, 964 P.2d 1167 (Utah App. 1998), 347 Utah Adv. Rep. at 15-16; State v. Larson, 775 P.2d 415, 418 (Utah 1989). The plain language of §77-17-13(4)(a) says the defendant is "entitled" to a continuance, and this Court has determined that it is contingent on the defendant seeking or claiming one. State v. Perez,

2002 UT App. 211, ¶41, 52 P.3d 451. Rothlisberger's trial counsel rendered ineffective assistance of counsel in this regard.

Rothlisberger's trial counsel failed to request a continuance to which he was entitled under the plain language of UTAH CODE ANN. §77-17-13(4)(a). In the absence of a request for a continuance from his trial counsel, the trial court had no duty to order a continuance. State v. Perez, 52 P.3d 451 (Utah App.,2002). Rothlisberger's trial counsel's performance in this area fell below an objective standard of reasonableness in that she failed to exhaust all remedies available to avoid proceeding unprepared with an undisclosed expert witness. Given the fact that a continuance is statutorily mandated by UTAH CODE ANN. §77-17-13(4)(a), there can be no conceivable, legitimate tactic or strategy surmised from her actions, or lack thereof. Perry at 1241.

Rothlisberger's trial counsel's failure to request the statutorily mandated continuance under UTAH CODE ANN. §77-17-13(4)(a) caused a failure to preserve the issue for appeal. State v. Hansen, 2002 UT 114, ¶21 at fn. 2, 61 P.3d 1062 *citing State v. Roth,* 2001 UT 103, ¶ 5, 37 P.3d 1099. Despite Appellant's trial counsel's ineffective assistance in this regard, Appellant believes this issue should be addressed by this Court.

(b) ROTHLISBERGER WAS ENTITLED TO CONTINUANCE TO PREPARE FOR THE UNDISCLOSED EXPERT TESTIMONY OFFERED BY ADAIR.

UTAH CODE ANN. §77-17-13, in relevant part, states as follows:

> (1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held

> pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but **not less than 30 days before trial** or ten days before the hearing.
> (b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:
> (i) a copy of the expert's report, if one exists; or
> (ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and
> (iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.
> . . .
> (4) (a) **If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.**

(emphasis added). Upon a finding that a party failed to comply with the thirty day notice requirement of UTAH CODE ANN. §77-17-13(1)(a), subsection 4(a) *requires* the trial court to grant a continuance sufficient to prepare the meet the testimony. State v. Arellano, 964 P.2d 1167, 1170 (Utah App. 1998).

As argued *supra*, Appellant's trial counsel was ineffective as it pertains to preserving this issue for appeal, thus failing to afford the trial court an opportunity to determine the matter. However, Appellant assumes the trial court would have denied a motion for continuance under UTAH CODE ANN. §77-17-13 since it found Adair's testimony to be that of a lay person under UTAH RULES OF EVIDENCE 701, rather than an expert under Rule 702. Without designating Adair as an "expert" at trial, it is reasonable to believe that the trial court would **not** have entertained an objection based upon §77-17-13, which is specifically titled

"Expert Testimony, generally — Notice Requirements." Thus, Appellant addresses the issue under the presupposition of a trial court denial of a continuance.

In reviewing a denial of a request for a continuance for a §77-17-13 notice violation, this Court considers four factors, as follows:

> (1) the extent of appellant's diligence in his efforts to ready his defense prior to the date set for trial; (2) the likelihood that the *need* for a continuance could have been met if the continuance [was] granted; (3) the extent to which granting the continuance would...inconvenience[] the court and the opposing party; and (4) the extent to which the appellant might...suffer[] harm as a result of [the denial of a continuance].

State v. Tolano, 2001 Ut App. 37, ¶9, 19 P.3d 400 *citing* State v. Arellano, 964 P.2d 1167, 1170 (Utah App. 1998); State v. Begishe, 937 P.2d 527, 530 (Utah App. 1997). It is clear that each of these four factors was met in the instant case. First, Appellant exercised diligence in his efforts to prepare his defense prior to the date set for trial. Appellant's trial counsel appeared, was adequately prepared to proceed with trial, and extensively cross-examined the prosecution's witnesses to the best of her ability[1].

Second, the need for a continuance could have been met had Appellant's trial counsel requested one and had the trial court granted one. Appellant's trial counsel did object to Adair's testimony, asking that the trial court exclude it. Because Adair's testimony was

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[1] This statement, of course, is not intended to preclude Appellant's prior argument that trial counsel was not afforded the time to prepare for Adair's testimony, and it should not be assumed to do so. Without notification, Appellant's trial counsel was obviously not able to adequately cross-examine Adair on the issues argued *supra*.

undisclosed by the prosecution, Appellant's trial counsel was unprepared to rebut it. Had a continuance been granted, Appellant's trial counsel could have obtained the curriculum vitae and a written explanation of Adair's proposed testimony, enabling her to prepare a proper defense on Appellant's behalf. *See*, UTAH CODE ANN. §77-17-13(b)(ii).

Third, any inconvenience to the court and the prosecution has been specifically held by this Court to be outweighed by Appellant's right to a fair trial. State v. Arellano, 964 P.2d 1167, 1170 (Utah App. 1998) *citing* Begishe at 531. Fourth, the extent to which Appellant might have suffered harm is the most important among the factors and, in Arellano, this Court shifted the burden to the State to show that the error did not unfairly prejudice Appellant. *See*, Tolano at ¶14; State v. Knight, 734 P.2d 913, 920-921 (Utah 1987). This case clearly met the Tolano factors and a continuance would have been sufficient to correct the error.

(3) The failure to disclose Adair's testimony was prejudicial to Appellant.

Adair's testimony was relied upon heavily in the decision handed down by the jury; to wit, Possession of a Controlled Substance With Intent to Distribute, a second degree felony. Adair testified to the significance of the amount of methamphetamine and the drug paraphernalia found in the vehicle, both of which direct a jury to the conclusions drawn in this matter. Adair was not disclosed as an expert to defense counsels, and should not have been allowed to testify as an expert at the trial without allowing the defense time to prepare for the testimony. His testimony was prejudicial to Rothlisberger and was a clear violation

of Rule 16 of the UTAH RULES OF CIVIL PROCEDURE and UTAH CODE ANN. §77-17-13. Rothlisberger's right to a fair trial was violated. UNITED STATES CONSTITUTION, Amends. VI and XIV; CONSTITUTION OF UTAH Art. I §§ 7 and 12. The only remedy for this violation at this stage is reversal of the Judgment entered May 21, 2003. *See*, State v. Begishe, 937 P.2d 537 (Utah App. 1997).

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

This court's power to review a jury verdict challenged on grounds of insufficient evidence is limited. State v. Silva, 2000 UT App 292,¶ 13, 13 P.3d 604 (quotations and citations omitted). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, this Court's inquiry stops. State v. Mead, 2001 UT 58,¶ 67, 27 P.3d 1115 (quotations and citation omitted). This Court will reverse a jury verdict only when it finds that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. State v. Hardy, 2002 UT App 244,¶ 7, 54 P.3d 645 (*quoting* State v. Silva, 2000 UT App 292,¶13, 13 P.3d 604) (additional quotations and citations omitted).

In challenging a denial of a motion for a directed verdict, parties are required to marshal all of the evidence in favor of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." Crookston v. Fire Ins.

Exch., 817 P.2d 789, 799 (Utah 1991). In reviewing a trial court's rulings pertaining to a motion for a directed verdict, this court reviews the evidence in the light most favorable to the non-moving party and to afford him the benefit of all inferences which the evidence fairly supports. If reasonable persons could reach differing conclusions on the issue in controversy, a jury question exists and the motion should be denied. Depew v. Sullivan, 2003 UT App 152, ¶41 at fn. 18, *citing* McCloud v. Baum, 569 P.2d 1125, 1126-1127 (Utah 1977).

A. Marshaling of the Evidence.

On September 24, 2000, Appellant was a passenger in a vehicle driven by Althoff (Tr. at p. 50). Althoff was pulled over by Eberling twice; first, when the vehicle touched the center dotted line, crossed outside the fog line, came back into the travel lane, then pulled off the road without signaling and stopped; and second, when Eberling received information that the vehicle's plates had expired (Tr. at pp. 50-52, 74-75). Subsequent to the second stop, Eberling received information that Althoff's driver's license was suspended, so he handcuffed her and placed her under arrest for driving on a suspended license (Tr. at pp. 52-53, 66, 72, 80). Althoff was placed in the back seat of Eberling's patrol car (Tr. at p. 83).

Eberling asked Appellant to step out of the vehicle so he could search the vehicle incident to the arrest (Tr. at p. 53). Appellant complied and exited the vehicle and went around to the front of the car (Tr. at p. 68). Upon initial search of the vehicle, Eberling found a small baggie containing a white substance he believed to be methamphetamine on the console between the driver and passenger seat. *Id.*, Tr. at p. 73; Exhibit "1" at p. 5. Eberling

testified that he handcuffed and placed Appellant under arrest and then called Chief Adair to come and assist (Tr. at pp. 54-55, 80, 83). Adair testified that he believed Eberling found the small baggie while he was there (Tr. at p. 98). Adair also testified that, when he arrived, Appellant was on the pay phone and was not handcuffed and Adair did not know that Eberling had placed Appellant under arrest (Tr. at p. 83, 94, 95).

Upon arriving, Adair accompanied Appellant while Appellant drove the vehicle across the street to an abandoned station so the officers could continue searching it (Tr. at p. 55, 74, 76, 83-84). When Adair tried to get in the vehicle to accompany Appellant, he noticed the passenger side door did not have a panel and a pair of men's levi's were stuffed in the open frame. *Id.* The pants were in the way, so Appellant told Adair he could take them out of the door frame to get them out of the way (Tr. at p. 97). Althoff at some point told Adair that she had put the pants there because it was cold. *Id.*

After moving Althoff's vehicle across the street, Adair went to get his patrol car (Tr. at p. 84, 96). On his way back in his patrol car, Adair observed Appellant acting nervous and trying to look in the back window of the car to see what Eberling was doing (Tr. at p. 85, 96). Eberling was searching in the car on the passenger front seat. *Id.* Adair directed Appellant to sit down and told Eberling to look in the front passenger seat. *Id.*

Upon further searching of the vehicle, Adair then located a toilet paper roll with a bag containing 210 milligrams of methamphetamine in the passenger side door frame of the vehicle (Tr. at p. 56, 65, 74, 85, 98-99; Exhibit "1" at p. 2, and Exhibits "5" and "6"). Adair

also located a snort bottle containing methamphetamine residue inside the pocket of the men's pants (Tr. at pp. 57, 60, 62, 64, 84, 86-87, 93, 100-101; Exhibit "1" at p. 2; Exhibit "9"). Appellant informed Adair that the snort bottle was his (Tr. at p. 87). Adair then mirandized Appellant and Appellant informed him that he had used methamphetamine that morning (Tr. at pp. 88-89).

Eberling then located a gym bag in the back seat of the vehicle which contained a wooden box with scales and baggies (Tr. at p. 59; Exhibits "7" and "8"). The scales contained white residue. *Id.* After locating these items in the vehicle, Eberling mirandized Althoff while she was in the back of his patrol car and Althoff informed Eberling that the crystal methamphetamine was hers and that Appellant knew nothing about it (Tr. at p. 61, 69, 71, 95). Althoff claimed she obtained the drugs from a friend in Bluff (Tr. at p. 69). Althoff also claimed ownership of the gym bag, which contained the scales and baggies (Tr. at pp. 62-63, 69, 71). Eberling conducted field sobriety tests on Althoff (Tr. at p. 70, 75-80). Eberling directed that Althoff undergo a urinalysis test, which came back positive for methamphetamine. *Id.* Eberling did not request a urinalysis test from Appellant (Tr. at pp. 70-71, 76).

B. The Circumstantial Evidence Failed to Sufficiently Exclude the Alternative Hypothesis.

A defendant's "mere occupancy of a portion of the premises where the drug[s were] found cannot, without more, support a finding" that defendant knowingly and intentionally possessed a controlled substance. State v. Hansen, 732 P.2d 127, 132 (Utah 1987). However,

constructive possession may be established through circumstantial evidence. *See,* State v. Carlson, 635 P.2d 72, 74 (Utah 1981). A finding of constructive possession of controlled substances in nonexclusive occupancy settings generally is based on extensive and detailed factual evidence. *See,* State v. Anderton, 668 P.2d 1258, 1264 (Utah 1983). Evidence must be "sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he was convicted." State v. Salas, 820 P.2d 1386, 1387 (Utah App. 1991). Circumstantial evidence presented must sufficiently exclude reasonable alternative hypotheses of innocence. State v. Layman, 953 P.2d 782, 790 (Utah App. 1998); *Cf.* State v. Shipp, 216 N.J.Super. 662, 524 A.2d 864, 866 (App.Div.1987) (stating "members of the same family commonly travel together in the same automobile, and the fact that these two were together on this occasion is no more consistent with the proposition that defendant was a participant in [his grandmother's] criminal enterprise than that he was not.").

No evidence was presented indicating that Rothlisberger had actual possession of any controlled substance, so this is a case of constructive possession. The circumstantial evidence, as marshaled *supra* and presented at trial was sufficiently inconclusive to prove constructive possession.

Rothlisberger was a passenger in a vehicle driven by Althoff. The larger baggie of methamphetamine was found in a toilet paper roll in the passenger side door frame, where Althoff had stuffed a pair of men's pants to keep the cold air from getting in the car. The

scales and baggies considered to be the drug paraphernalia used in distribution were found concealed in the back seat of the car in a gym bag, which was claimed by Althoff. Appellant appeared nervous to Adair when Eberling was searching the passenger side of the front seat.

This circumstantial evidence is no more consistent with the proposition that Appellant planned to distribute this quantity of methamphetamine than it is that he did not. This *less than* extensive and detailed evidence does not sufficiently exclude the alternative hypothesis that Appellant (a) did not know the toilet paper roll[2] or the scales and baggies[3] were even in the vehicle and (b) was nervous only because the pants which contained the snort bottle to which Appellant claimed ownership were located in this same vicinity of the vehicle as the toilet paper roll—namely, the front passenger side. Appellant's nervousness is just as easily explained by the idea that he was concerned about the officers discovering the snort bottle in that vicinity of the vehicle.

A vehicle is a nonexclusive occupancy setting where proximity cannot prove guilt since the entire surroundings are proximal to any of its occupants. Rothlisberger's presence in the vehicle cannot alone support a finding that he knowingly and intentionally possessed

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[2] Adair testified that Rothlisberger told him to pull the pants out of the door if they were in the way (Tr. at p. 97). If Rothlisberger had actual knowledge that the toilet paper roll was in the door panel, he naturally would have been at least a little reluctant in allowing Adair to remove the pants; however, Adair's testimony did not indicate any reluctance on Rothlisberger's part.

[3] It is important to reiterate that the scales and baggies were found concealed in Althoff's gym bag in the backseat of the vehicle, and no evidence was presented indicating that Rothlisberger had any knowledge they were there.

a controlled substance. Hansen at 132. It is clear to see that the evidence presented was insufficient. Based on the evidence presented at trial, a reasonable mind could easily entertain doubt that Rothlisberger committed the crimes of possession and, particularly, possession with intent to distribute.

C. Appellant's admitted use of methamphetamine earlier that day cannot support a conclusion of possession.

This Court has previously determined that drug use does not, in and of itself, conclude that a defendant had access to and control over the drugs, even when the defendant is under the influence when investigated by police officer. State v. Layman, 953 P.2d 782, 791 (Utah App. 1998). Where consumption of a drug occurred at some prior point in the day, that evidence in and of itself does not sufficiently show that the person had "access to or control over" the drugs found by police. *Id.* The State must have proven "mutual use and enjoyment" to support a "an inference of joint participation in a criminal enterprise." *Id.*

Rothlisberger admitted to having used earlier that morning before leaving Arizona and admitted that the snort bottle found in the jeans stuffed in the door was his. No evidence was presented by the prosecution indicating that the residue in the snort bottle was the same as that which was found in the large or small baggies in the vehicle. The State failed to prove "mutual use and enjoyment" or any intent on behalf of Mr. Rothlisberger. His admitted use of methamphetamine earlier in the day does not support a conclusion of possession or possession with intent to distribute.

D. Actual knowledge and location in vehicle does not prove possession.

Actual knowledge of the location of drugs in the vehicle a person is traveling in, with no intent to use the drugs, cannot stand to convict a person for possession. *See* State v. Fox, 709 P.2d 316, 319 (Utah 1985) ("[P]ersons who might know of the whereabouts of illicit drugs and who might even have access to them, but who have no intent to obtain and use the drugs cannot be convicted of possession."); Shipp, 524 A.2d at 866 ("[M]ere knowledge, without more, on the part of one automobile passenger that a co-passenger is carrying illicit drugs does not constitute the former a co-possessor."); Arellanes v. United States, 302 F.2d 603, 606-07 (9th Cir.1962) (stating evidence that wife was present with husband at time drugs were found in car and that she was probably aware of presence of drugs was not sufficient to establish elements of joint venture where her presence with husband and drugs "is as fully explained by her attachment to her husband as it might be by a control over the drugs.").

As established above, Rothlisberger was a passenger in a vehicle driven by Althoff. Althoff stated to police officers that Rothlisberger knew nothing about the methamphetamine and the drug paraphernalia found in the vehicle. Even if Rothlisberger did know that Althoff had methamphetamine and drug paraphernalia in the vehicle, the State never presented any evidence that Rothlisberger had any intent to obtain or use the drugs. *See*, State v. Fox, 709 P.2d 316, 319 (Utah 1985) Not only did the State fail to prove that Rothlisberger had the requisite intent, but they did not even present evidence at trial indicating that he had any

knowledge whatsoever. Without more evidence, Rothlisberger as a co-passenger cannot automatically be deemed a co-possessor. Shipp, 524 A.2d at 866.

E. A jury is not allowed to indulge in inference upon inference that could lead but to conjecture.

Where the State failed to present evidence establishing a pivotal fact--in this case, that Rothlisberger was aware and a knowing participant in the criminal enterprise, *see* State v. Fox, 709 P.2d 316, 319 (Utah 1985)–this Court has cautioned courts to take special care to ensure that their review of the evidence does not encourage the indulging of "inference upon inference," or, worse, the indulging of inference upon assumption. State v. Layman, 953 P.2d 782, 791 (Utah App.,1998) *citing* State v. George, 481 P.2d 667 (Utah 1971) (finding "no evidence as to whether the defendants ... took the truck and camper, save by way of inference ... and we believe that under the facts of this particular case, the jury had to indulge an inference upon an inference that could lead but to conjecture"); *see also* State v. Franks, 649 P.2d 3, 4 (Utah 1982) (reversing jury verdict of theft after noting "[a]lthough the elements of an offense may be established by direct or circumstantial evidence, the evidence adduced in this case was *de minimis* and therefore insufficient to support a conviction" and rejecting State's argument that "there is no evidence that the owner consented to defendant's control of the vehicle" where "burden is on the state to show unauthorized control, *not* on the defendant to show authorized control." (footnote omitted)).

Rothlisberger admitted to having used drugs earlier that day before leaving Arizona. He also admitted to owning the snort bottle that contained residue of methamphetamine,

which was found in his pants. The only other evidence presented with respect to Rothlisberger was that he was the passenger in the vehicle Althoff was driving, which vehicle contained methampetamine and drug paraphernalia in the form of scales and baggies that Althoff claimed in their entirety as her own. Based on this minimal evidence, a jury convicted Rothlisberger of the second degree felony of possession with intent to distribute.

To come to this type of conclusion based on the minimal evidence, the jury had to indulge an inference upon an inference, or inference upon assumption, that could lead but to conjecture. An inference is defined as "[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." *Black's Law Dictionary*, Abridged 5th Ed., p. 398, "Inference." The evidence that Rothlisberger used methamphetamine earlier that day and that he possessed a snort bottle containing residue of the drug are not facts that logically lead a reasonable mind to the conclusion that Rothlisberger intended to distribute the methamphetamine. For this reason, to say that the jury indulged in inference upon inference is in itself somewhat farreaching.

To assume is to pretend. *Black's Law Dictionary*, Abridged 5th Ed., p. 63, "Assume." It is more likely that the jury *assumed* that Rothlisberger had the necessary intent to obtain and use the methamphetamine and drug paraphernalia since no evidence was ever presented with respect to this intent. This Court cautioned courts to take special care to ensure that their review of the evidence did not encourage the indulging of "inference upon inference,"

or, worse, the indulging of inference upon assumption. State v. Layman, 953 P.2d 782, 791 (Utah App.,1998) *citing* State v. George, 481 P.2d 667 (Utah 1971); *see also* State v. Franks, 649 P.2d 3, 4 (Utah 1982). Based on the jury's assumption, Rothlisberger was convicted of a crime the State failed to prove beyond a reasonable doubt and his conviction should be overturned.

F. The State must prove case beyond a reasonable doubt.

The State carries the burden in criminal cases of proving each element of the charged crime beyond a reasonable doubt. In cases relying on constructive possession, that burden entails a presentation of extensive and detailed facts. Layman *citing* Anderton, 668 P.2d at 1263. Lack of such evidence may well make it impossible for the State to fulfill its duty to establish-- beyond a reasonable doubt--the necessary nexus between a defendant and the contraband; any significant deficiency in evidence establishing the nexus almost always leaves room for those "reasonable hypothes[es] of innocence" which "necessarily raise[ ] a reasonable doubt as to the defendant's guilt." Layman *citing* Hill, 727 P.2d at 222 (citation omitted).

Neither possibilities nor probabilities can substitute for certainty beyond a reasonable doubt. Layman *citing* State v. Murphy, 617 P.2d 399, 402 (Utah 1980) ("[C]riminal convictions may not be based upon conjectures or probabilities and before we can uphold a conviction it must be supported by a quantum of evidence concerning each element of the crime as charged from which the jury may base its conclusion of guilt beyond a reasonable

doubt."); *see also* Zertuche v. State, 774 S.W.2d 697, 701 (Tex.Ct.App.1989)("[S]trong suspicions or mere probabilities are not sufficient.").

As argued above, the jury indulged in assumptions which led simply to conjecture. No extensive or detailed facts were presented at trial to sufficiently establish the nexus between Rothlisberger and the methamphetamine and drug paraphernalia, particularly for a conviction of the second degree felony of possession with intent to distribute. In failing to establish this necessary nexus, the reasonable hypothesis of Rothlisberger's innocence cannot be ignored. Althoff laid claim to the methamphetamine and the drug paraphernalia and absolutely no evidence was presented countering her testimony. The State failed to prove its case beyond a reasonable doubt.

G. The Jury cannot discredit Tonya's testimony and replace it with its belief as to truth of evidence not in the record.

Although the jury may reject Althoff's testimony as not credible, this Court has stated that it cannot substitute its belief as to the truth of evidence not in the record. State v. Layman, 953 P.2d 782, 790 (Utah App.,1998). Althoff laid claim to the large quantity of methamphetamine and the paraphernalia found in the car by the police officers. At trial, the State attempted to discredit her testimony as simply trying to protect Rothlisberger; however, no evidence was presented to show that Rothlisberger had knowledge of its existence, nor that he had possession or control over it or even intended to possess or control it. Without any evidence in the record, the jury, after discrediting Althoff's testimony, substituted its belief as to the truth of evidence not in the record. This Court has reversed in prior cases

where juries have participated in this type of misguided practice , and it should do so here. *See,* State v. Layman, 953 P.2d 782, 790 (Utah App.,1998).

III. THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE PROSECUTOR'S MISSTATEMENT OF LAW IN HIS CLOSING

In determining whether a given statement constitutes prosecutorial misconduct, this Court must view the statement in light of the totality of the evidence presented at trial; further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings will not be overturned absent an abuse of discretion. State v. Longshaw, 961 P.2d 925 (Utah App. 1998). This Court has enunciated a two-part test whereby it will reverse on the basis of prosecutorial misconduct only if defendant shows that [1] "the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, [2] under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result...." *Id.* at 928, *citing* State v. Cummins, 839 P.2d 848, 852 (Utah App.1992) (*quoting* State v. Peters, 796 P.2d 708, 712 (Utah App.1990)), *cert. denied*, 853 P.2d 897 (Utah 1993). *Accord* State v. Span, 819 P.2d 329, 335 (Utah 1991); State v. Boyatt, 854 P.2d 550, 554-55 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993).

A. The Prosecutor's Misstatement of Law Called to the Attention of the Jury a Matter it Would Not Be Justified in Considering in Determining its Verdict.

Conviction of possession with intent to distribute requires proof of two elements: (1) that defendant knowingly and intentionally possessed a controlled substance, and (2) that defendant intended to distribute the controlled substance to another. State v. Fox, 709 P.2d 316, 318 (Utah 1985) (citing UTAH CODE ANN. §58-37-8(1)(a)(ii)). Possession of a controlled substance sufficient to sustain a conviction need not be actual but may be constructive. State v. Bingham, 732 P.2d 132, 133 (Utah 1987). In cases involving joint occupancy of a place where contraband is found, mere control or dominion over the place in which the contraband is found is not enough to establish constructive possession. U.S. v. McKissick, 204 F.3d 1282 (C.A.10 (Okla.),2000) *citing* United States v. Mills, 29 F.3d 545, 549 (10th Cir.1994). "Evidence supporting the theory of 'constructive possession' must raise a reasonable inference that the defendant was engaging in a criminal enterprise and not simply a bystander." State v. Fox, 709 P.2d 316, 320 (Utah 1985).

In order to prove constructive possession, there must be a nexus between the accused and the drug sufficient enough to allow an inference that the accused had both the ability and the intent to exercise dominion and control over the drug. State v. Fox, 709 P.2d 316, 319 (Utah 1985); *see also* State v. Bingham, 732 P.2d 132, 133 (Utah 1987); State v. Hansen, 732 P.2d 127, 131 (Utah 1987). A sufficient nexus is not established by mere "[o]wnership and/or occupancy of the premises upon which the drugs [were] found ... especially when

occupancy is not exclusive." State v. Salas, 820 P.2d 1386 (Utah App. 1991) *citing* Fox, 709 P.2d at 319. This general rule supports the assertion that "the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs ..." *Id. citing* Annotation, *Conviction of Possession of Illicit Drugs Found in Automobile of Which Defendant Was Not Sole Occupant*, 57 A.L.R.3d 1319, 1326 (1974). In order to find that the accused was in possession of drugs found in an automobile he was not the sole occupant of, and did not have sole access to, there must be other evidence to buttress such an inference.

Mere knowledge, without more, on the part of one automobile passenger that a co-passenger is carrying illicit drugs does not constitute the former a co-possessor. State v. Layman, 953 P.2d 782, 791 (Utah App. 1998) *citing* State v. Shipp, 524 A.2d 864, 866 (N.J. Super. A.D. 1987). Knowledge and ability to possess do not equal possession where there is no evidence of intent to make use of that knowledge and ability. State v. Fox, 709 P.2d 316, 319 (Utah 1985). Persons who might know of the whereabouts of illicit drugs and who might even have access to them, but who have no intent to obtain and use the drugs cannot be convicted of possession. *Id.*

Presence and proximity are inadequate to support a conviction for possession of a controlled substance. U.S. v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir.(N.M.),1998). Evidence of prior use by the defendant does not in itself support a finding of knowledge,

ability and intent to exercise dominion and control over drugs. State v. Layman, 953 P.2d 782, 789 (Utah App. 1998).

At the conclusion of the trial in the instant case, the prosecutor presented his closing arguments to the jury (Tr. at pp. 143-158). The colloquy at issue here is as follows:

> [MR. HALLS]: If I drive the car with people with drugs in it and I know the drugs are in there, I'm guilty of possession, the same as they.
> MS. REILLY: Objection, your Honor, that's a misstatement of the law.
> MR. HALLS: What's the objection?
> THE COURT: It's a misstatement of law.
> MS. REILLY: If the Court doesn't me to argue it, then I'll come up and say that (inaudible).
> MR. HALLS: I thought I was making a point about what aiding somebody is. I don't think I misstated that.
> MS. REILLY: Simply being in a car where another person has drugs doesn't make everybody in the car guilty of that. That's a misstatement, unless they just have to have (inaudible).
> THE COURT: I thought he said driving the car.
> MR. HALLS: I said if they were driving the car and they knew the drugs were in there — I'm setting forth the proposition that that's aiding or (inaudible).
> THE COURT: I think driving the car can make (inaudible). Objection overruled.
> MR. HALLS: "A person who encourages or aids another person to engage in conduct which constitutes an offense is criminally liable (inaudible) for the same conduct." That's your instruction No. 7.
>
> Your instruction No. 6 says something kind of similar. It's not required that a person be shown to have individually possessed or used a controlled substance. The substance – but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession or control." That's called accomplice liability.
>
> That means if he knew, and you have many indications that he knew it was there, even though she's taking credit for it, you don't have to believe that that was the truth when she yells out, "That's just mine."
>
> You can find that he knew it was there. If you do, ladies and gentlemen, you can find Mr. Rothlisberger guilty of possession with intent to distribute. You can find her guilty of the same thing. I think you can do that without having to resort to either one of these instructions.

> But if you, if that doesn't make you comfortable, then you should say, "Well, but if he aided and assisted her or knew that she was doing this, or he knew she was participating in this," you can still find him guilty under that theory.

(Tr. at pp. 151-152).

The prosecutor first misstated the law when he set forth that "[i]f I drive the car with people with drugs in it and I know the drugs are in there, I'm guilty of possession, the same as they." (Tr. at p. 151). A sufficient nexus between the accused and the drug to prove constructive possession is not established by mere "[o]wnership and/or occupancy of the premises upon which the drugs [were] found ... especially when occupancy is not exclusive." State v. Salas, 820 P.2d 1386 (Utah App. 1991) *citing* Fox, 709 P.2d at 319. Additionally, mere knowledge, without more, on the part of one automobile passenger that a co-passenger is carrying illicit drugs does not constitute the former a co-possessor. State v. Layman, 953 P.2d 782, 791 (Utah App. 1998) *citing* State v. Shipp, 524 A.2d 864, 866 (N.J. Super. A.D. 1987). The prosecutor's statement led the jury to believe that, if a person drives a car with drugs in it and they know the drugs are there, then they are guilty of possession. The prosecutor obviously misstated the law and brought to the attention of the jury a matter it would not be justified in considering in determining its verdict.

The next misstatement of the law occurred when the prosecutor informed the jury, with respect to Jury Instruction No. 6, that if they could find that Rothlisberger knew the drugs were in the car, then they could find him guilty of possession with intent to distribute (Tr. at p. 152). Conviction of possession with intent to distribute requires proof of two

elements: (1) that defendant knowingly and intentionally possessed a controlled substance, and (2) that defendant intended to distribute the controlled substance to another. State v. Fox, 709 P.2d 316, 318 (Utah 1985) (*citing* UTAH CODE ANN. §58-37-8(1)(a)(ii)). The prosecutor's misstatement of the law here led the jury to believe that all they needed to find was that Rothlisberger had knowledge that the drug was there and they could find him guilty of possession with intent to distribute. The law clearly states that mere knowledge, without more, on the part of one automobile passenger that a co-passenger is carrying illicit drugs does not constitute the former a co-possessor. State v. Layman, 953 P.2d 782, 791 (Utah App. 1998) *citing* State v. Shipp, 524 A.2d 864, 866 (N.J. Super. A.D. 1987). Not only is knowledge insufficient to a showing of possession, but it is extremely farreaching to state that it is sufficient to show possession with intent to distribute. The prosecutor obviously misstated the law and brought to the attention of the jury a matter it would not be justified in considering in determining its verdict.

Although the prosecutor's statement seems focused on the "driver" of the vehicle, the prosecutor intended the statement to also go to Appellant's occupancy of the premises. As the prosecutor explained, he was attempting to set up a theory of "aiding." (Tr. at p. 152). Later in his closing arguments, the prosecutor stated that, if the jury doesn't feel comfortable finding Appellant guilty of possession with intent to distribute, then they can still find him guilty by aiding and assisting Althoff under the theory created by his misstatement of the law

(Tr. at p. 153). It is clear that the prosecutor misstated the law and intended for it to pertain to Appellant's involvement in the matter.

B. The Error Was Substantial and Prejudicial Such That There Is a Reasonable Likelihood That, in its Absence, There Would Have Been a More Favorable Result.

This Court will reverse on the basis of prosecutorial misconduct if defendant shows that [1] "the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, [2] under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result...." *Id.* at 928, *citing* State v. Cummins, 839 P.2d 848, 852 (Utah App.1992) (*quoting* State v. Peters, 796 P.2d 708, 712 (Utah App.1990)), *cert. denied*, 853 P.2d 897 (Utah 1993). *Accord* State v. Span, 819 P.2d 329, 335 (Utah 1991); State v. Boyatt, 854 P.2d 550, 554-55 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993). The second prong of the prosecutorial misconduct test requires "consideration of the circumstances of the case as a whole. In making such a consideration, it is appropriate to look at the evidence of defendant's guilt." State v. Troy, 688 P.2d 483, 486 (Utah 1984). *Accord* State v. Finlayson, 956 P.2d 283 (Utah Ct.App.1998). Thus, " '[i]f proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial.' Likewise, in a case with less compelling proof, [an appellate court] will more closely scrutinize the conduct." Troy, 688 P.2d at 486 (*quoting* State v. Seeger, 4 Or.App. 336, 479 P.2d 240, 241 (1971)). If the conclusion of the jurors

is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel. Troy, 688 P.2d at 486.

As argued above under Argument "II," the evidence was sufficiently lacking for a determination that Rothlisberger was guilty of possession or possession with intent to distribute. Thus, a more closely scrutinized analysis of the prosecutor's misstatements of the law is warranted. A review of the evidence in this case, when coupled with the prosecutor's misstatements of the law, clearly show that the error was prejudicial and there is a reasonable likelihood that, in its absence, there would have been a more favorable result.

The conclusions drawn by the jury in this matter were based upon circumstantial evidence, which is not based in actual personal knowledge or observation of the facts in controversy, but on other facts from which deductions are drawn. *Black's Law Dictionary*, Abridged 5th Ed., p. 126, "circumstantial evidence." The simple fact that the evidence is circumstantial in the instant matter induces susceptibility to differing interpretations. As argued *supra*, circumstantial evidence presented must sufficiently exclude reasonable alternative hypotheses of innocence. State v. Layman, 953 P.2d 782, 790 (Utah App. 1998); *Cf.* State v. Shipp, 216 N.J.Super. 662, 524 A.2d 864, 866 (App.Div.1987).

The circumstantial evidence of the instant case is no more consistent with the proposition that Appellant planned to distribute this quantity of methamphetamine than it is that he did not. This *less than* extensive and detailed evidence does not sufficiently exclude

the alternative hypothesis that Appellant (a) did not know the toilet paper roll[4] or the scales and baggies[5] were even in the vehicle and (b) was nervous only because the pants which contained the snort bottle to which Appellant claimed ownership were located in this same vicinity of the vehicle as the toilet paper roll—namely, the front passenger side. Appellant's nervousness is just as easily explained by the idea that he was concerned about the officers discovering the snort bottle in the pants.

With less than compelling evidence, the jury was improperly influenced by the prosecutor's misstatements of the law. Hypothetically, if the jury had only been able to find with the evidence presented that Rothlisberger had knowledge that the drugs were in the vehicle, the prosecutor's misstatement would have led them to believe that finding the requisite nexus was completely unnecessary. The jury was inappropriately led to believe that they simply had to find that Rothlisberger had knowledge to find him guilty, not only of constructive possession, but of possession with intent to distribute.

The prosecutor's misstatements of the law brought matters to the attention of the jury that it would not be justified in considering in determining its verdict. Because these matters

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[4] Adair testified that Rothlisberger told him to pull the pants out of the door if they were in the way (Tr. at p. 97). If Rothlisberger had actual knowledge that the toilet paper roll was in the door panel, he naturally would have been at least a little reluctant in allowing Adair to remove the pants; however, Adair's testimony did not indicate any reluctance on Rothlisberger's part.

[5] It is important to reiterate that the scales and baggies were found concealed in Althoff's gym bag in the backseat of the vehicle, and no evidence was presented indicating that Rothlisberger had any knowledge they were there.

were brought to the attention of the jury, the inadequate evidence presented by the State was inappropriately considered adequate for a finding of possession and possession with intent to distribute. As argued *supra*, the evidence was insufficient to find Rothlisberger guilty of possession or possession with intent to distribute. Because the misstatements made by the prosecutor went directly towards the findings, it is likely that this matter would have born a different outcome absent those statements. Because the misstatements were allowed by the trial court, Rothlisberger was denied his right to a fair trial and the Judgment should be reversed. UNITED STATES CONSTITUTION, Amend. VI and XIV; UTAH CONSTITUTION, Art. 1 § 7.

CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests that this Court reverse the trial court's Judgment.

DATED this 17TH day of SEPT., 2003.

Barton J. Warren
Attorney for Thomas Kevin Rothlisberger

CERTIFICATE OF MAILING

I hereby certify that on this 17 Th day of SEPT., 2003, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

J. Frederic Voros, Jr.
Assistant Attorney General
160 East 300 South 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Addendum ~A~

Judgment and Order of Probation,
dated May 21, 2003

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. THOMAS KEVIN ROTHLISBERGER, Defendant.	**JUDGMENT AND ORDER OF PROBATION** COURT CASE NO: 0217-83

MAY 5, 2003

HONORABLE LYLE R. ANDERSON

Plaintiff Attorney: Craig C. Halls

Defendant Attorney: Barton J. Warren

DEFENDANT, THOMAS KEVIN ROTHLISBERGER, having heretofore been found guilty of the following offenses:

COUNT 1: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, a Second Degree Felony, and COUNT 2: POSSESSION OF DRUG PARAPHERNALIA, A Class B Misdemeanor, and no legal reason having been shown why judgment of this court should not be pronounced, it is the judgment of this court as follows:

That the Defendant be imprisoned in the Utah State Prison for a term of ONE (1) TO FIFTEEN (15) YEARS and SIX (6) MONTHS on Count 2 and pay a fine in the amount of $925.00 plus interest.

The prison sentence is stayed and Defendant is placed on probation with Adult Probation and Parole for a period of 36 months upon the following conditions:

1. That the defendant enter into an agreement with the Department of Corrections, Adult Probation and Parole and comply strictly with its terms and conditions.

2. That the defendant serve 12 months in the San Juan County Jail, receiving credit for time served.

3. That the defendant enter into and successfully complete any substance abuse/mental health treatment as directed by Adult Probation and Parole at his own expense.

4. Submit to Utah State Statute 53-10-405.5 and allow the Utah Department of Corrections to obtain DNA specimens from the defendant and pay for the costs associated with obtaining the DNA specimens.

5. That the defendant not associate with co-defendant Tonya Althoff.

6. That the defendant not associate with persons known to use, distribute or possess illegal/controlled substances or those arrested previously for drug offenses.

7. That the defendant be required to place a sign on the front door of residence indicating that he is on probation and

anyone entering the residence is subject to search. That the sign not be removed without the consent of the court or Adult Probation and Parole.

8. That the defendant report to the Department and to the Court whenever required.

9. That the defendant violate no law, either Federal, State or Municipal.

The Court retains jurisdiction to make such other and further orders as it may deem necessary from time to time.

DATED this 24th day of May, 2003.

Lyle R. Anderson
District Court Judge

Craig C. Halls
San Juan County Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21st day of May, 2003, I mailed, postage prepaid, a true and correct copy of the above JUDGMENT AND ORDER to Barton J. Warren, Attorney for Defendant, 261 East 300 South, Suite 175, Salt Lake City, UT 84111. + A P+ P

Clerk